

Joe Angelo (Bar # 268542)  
[jangelo@gajplaw.com](mailto:jangelo@gajplaw.com)  
Gale, Angelo, Johnson, & Pruett, P.C.  
1430 Blue Oaks Blvd., Ste. 250  
Roseville, CA 95747  
916-290-7778 ph  
916-721-2767 fax

Attorney for Defendant  
Dean Asimos

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA – SANTA ROSA DIVISION

In Re:

**DEAN GREGORY ASIMOS**

Debtor

Jason Everett Thompson

Plaintiff

v.

Dean Gregory Asimos

Defendant.

Case No.: 11-13214

A.P. Case No.: 14-01018-CN

Chapter 7

**DEFENDANT'S MEMORANDUM OF  
POINTS AND AUTHORITIES IN SUPPORT  
OF HIS MOTION FOR SUMMARY  
JUDGMENT**

Date: November 4, 2020

Time: 11:00 am

Location: Tele/videoconference  
Tele/videoconference

Judge: Hon. Charles Novack

Debtor and Defendant Dean Asimos (hereinafter "Defendant" or "Asimos"), by and through his attorney Joe Angelo of Gale, Angelo, Johnson, & Pruett, P.C., hereby files this reply to Plaintiff Jason Everett Thompson's Opposition to Plaintiff's Motion for Summary Judgment.

In support of his reply, Defendant states as follows:

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## I. INTRODUCTION

Plaintiff's Opposition does little, if anything, to allow this court to make a finding that it should disregard the "fair contemplation" approach that is the law in the Ninth Circuit and focus on the narrow exclusion to find that Defendant "returned to the fray." As explained at length in Defendant's motion, the "fair contemplation" test allows for the discharge of post-filing fees/costs associated with pre-filing litigation. Plaintiff's Opposition also fails to raise any issues with respect to why Defendant's Motion for Summary Judgment should not be granted, as Defendant's Motion lays out the basis and rational for why Plaintiff failed to meet his burden under 11 U.S.C. § 523(a)(6). Lastly, Defendant's defense regarding advice/reliance upon his state court counsel was entirely reasonable, and the cases cited in his Motion for Summary Judgment allow the Court to not only accept that defense, but also make the finding that Asimos' counsel acted without his knowledge and/or direction in the handling of the state court litigation.

The Opposition filed in response to Defendant's Motion for Summary Judgment does not create any factual discrepancies that would prevent the Court from ruling in favor of Defendant and granting Motion. While Plaintiff may be upset that he forged ahead with the underlying state court litigation when seeking to lift the automatic stay, that was the risk he took in pursuit of his lawsuit. Again, the complained of activity all related to the initial state court complaint, which can be, and should be, subject to Asimos' chapter 7 discharge.

## II. REPLY

### A. The Facts Do Not Support A Finding Of Willful And Malicious Injury By Asimos

Plaintiff is apparently attempting to relitigate every detail of the events that occurred during the pendency of the statue court litigation instead of actually addressing the fact that it cannot be proven that Asimos "wilfully, intentionally and maliciously" injured Plaintiff. In Plaintiff's First Amended Complaint nearly ever allegation under his section 523(a)(6) cause of action is a conclusory statement that cannot be supported by the facts of this proceeding. At the outset, Asimos was unaware of the terms and conditions of the retainer agreement between Plaintiff and his counsel (and former counsel). Plaintiff never disclosed the nature of the fee arrangement with Asimos. There is no specific action or ongoing event that would support

1 Plaintiff's argument that Asimos "intended" any of the results of the state court litigation.  
2 Plaintiff fails to show that there is any factual issue that would require a further factual record to  
3 be developed, and as a result, Asimos should prevail on his request for this Court to dispose of  
4 the section 523(a)(6) claim in his favor. While the relationship between the parties was  
5 contentious during the state court litigation, actions taken in defense of a lawsuit does not equate  
6 to a 523(a)(6) violation.

7 Asimos readily disclosed the existence of his bankruptcy proceeding when asked by  
8 Plaintiff's counsel. Asimos fully informed his state court counsel of the bankruptcy proceeding.  
9 And Asimos was not privy to the nature of the legal relationship between Plaintiff and his various  
10 counsel. The Supreme Court in Kawaauhau v. Geiger (In re Geiger), 523 U.S. 57 (1998), made  
11 clear that for section 523(a)(6) to apply, the actor must intend the consequences of the act, not  
12 simply the act itself. Id., at 60. At best Asimos may have been negligent in the efforts  
13 surrounding the disclosure of his bankruptcy filing, but as Geiger recognized, negligence falls  
14 well short of the required intent and behavior in order to exclude a debt under section 523(a)(6).

#### 15 **B. "Fair Contemplation" Covers Post-Petition Actions**

16 Plaintiff's First Amended Complaint clearly states that Plaintiff is seeking to recover the  
17 Contract Attorney Fee Award (FAC ¶¶ 46, 47, 49; Prayer ¶ 2). Any new theory that the fee  
18 award is also unrelated breach of contract dispute pursued in the state court litigation is  
19 misplaced. The Ninth Circuit is clear that any claim for fees based on a contract dispute can,  
20 and should, be discharged in bankruptcy. This is true even if those fees are incurred post-petition  
21 and post-discharge, so long as it relates back to the initial cause of action. Camelback Constr. v.  
22 Castellino Villas, A.K.F., LLC, 836 F.3d 1028, 1034 (9th Cir. 2016).

23 Asimos did not engage in a "new course of litigation" or seek to disturb a settlement  
24 agreement by participating as a Defendant in the underlying state court action. Baroni v. Wells  
25 Fargo Bank, N.A., 558 B.R. 916 (C.D. Cal September 30, 2016) recognized the broad scope of  
26 the "fair contemplation" doctrine and stated that unless the debtor in a bankruptcy embarks on  
27 some type of new litigation that is unrelated to the initial action that give rise to the fee claim, it  
28 is not appropriate to exclude any of those fees/costs/judgments from the debtor's discharge. Id.,

1 at 929. Unlike the debtors in Ybarra and Siegel, Asimos did not seek to set aside a settlement  
2 agreement or undertake any new type of litigation. As such, the conduct of Asimos, as the  
3 defendant in the underlying state court action, falls well within the boundaries of the “fair  
4 contemplation” doctrine. As a result, the Court should grant Asimos’ Motion for Summary  
5 Judgment and enter judgment in his favor.

### 6 **C. Reliance / Advice Of Counsel Is An Appropriate Defense**

7 Should the Court need to consider Asimos’ advice/reliance of counsel defense, Asimos’  
8 Motion stated the basis for invoking such a defense and outlined the actions taken by his state  
9 court counsel. The defense of advice and/or reliance upon counsel has been recognized in  
10 various circuit courts and the California state courts. The purpose of the defense is to negate any  
11 intentional element of an allegation or cause of action made against the individual asserting the  
12 defense.

13 Courts have generally recognized that a party’s reliance on the advice of his or her  
14 counsel can negate an otherwise intentional aspect of an act or position taken by the represented  
15 party. See generally, Robinson v. Worley, 848 F.3d 577, 586 (4th Cir. 2017) (finding that  
16 reliance on the advice of counsel is an affirmative defense that absolves a debtor of fraudulent  
17 intent if the reliance on the advice was reasonable.); Retz v. Samson, 606 F.3d. 1189 (9th Cir.  
18 2010); In re Abdeeb, 787 F.2d 1339, 1343 (9th Cir. 1986) (“Generally a debtor who acts in  
19 reliance on the advice of his counsel lacks the intent required to deny him a discharge of his  
20 debts.”); Nunez v. Pennisi, 241 Cal. App. 4th 861 (2015) (finding that a good faith reliance on  
21 the advice of counsel, after a full disclosure of the relevant facts, can negate a finding of intent  
22 and can be used as an affirmative defense.)

23 Asimos maintains that the inquiry into the advice of counsel / reliance upon counsel  
24 defense is not necessary as the Court can rule in his favor without having to apply the relevant  
25 standard to the instant case. However, should the Court need to make the determination that  
26 Asimos’ defense is applicable, the statements and understanding put forth by Asimos in his  
27 Motion outline the issues he consistently experienced with his state court attorney. As the Courts  
28 found in Robinson v. Worley, 848 F.3d 577 (4th Cir. 2017); Retz v. Samson, 606 F.3d. 1189

1 (9th Cir. 2010); In re Abdeeb, 787 F.2d 1339 (9th Cir. 1986); and Nunez v. Pennisi, 241 Cal.  
2 App. 4th 861 (2015), an individual cannot be held accountable for the actions of his or her  
3 counsel when that individual is unaware of the actions being taken or is not fully informed of the  
4 course of the litigation. Such is the case here with Asimos and the relationship with his state  
5 court counsel.

### 6 **III. CONCLUSION**

7 Asimos respectfully requests that this Court grant his motion for summary judgment and  
8 find that Plaintiff cannot prove the elements of an 11 U.S.C. § 523(a)(6) claim and enter an order  
9 that denies the declaratory relief sought regarding the nondischargeability of Plaintiff's  
10 fees/costs. The facts cannot support a finding to the contrary.

11  
12 Dated: October 28, 2020

Gale, Angelo, Johnson, & Pruett, P.C.

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14 By: /s/ Joe Angelo

Joe Angelo

15 Attorney for Defendant Dean Asimos  
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